ATTORNEY FOR APPELLANT:

RICK M. MYERS
Lautzenheiser, Myers,
Carnall, Spear & Kiracofe, PC
Bluffton, Indiana

ATTORNEY FOR APPELLEE:

JOSEPH M. JOHNSON, II
Joseph M. Johnson, PC
Decatur, Indiana

IN THE
COURT OF APPEALS OF INDIANA

NICOLE L. HUSS,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 01A04-0611-CV-680
	)	
DAVID M. HUSS,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE ADAMS CIRCUIT COURT
The Honorable Frederick A. Schurger, Judge
Cause No. 01C01-0504-DR-37

July 25, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Nicole L. Huss ("Wife") appeals the dissolution decree awarding custody to David M. Huss ("Husband") of three children born to both parties to the marriage and one child born during the marriage but not fathered by Husband. We affirm in part and vacate in part.

Issues

Wife raises four issues; however, we need only address the two following restated issues:

I. Whether the Adams Circuit Court erred in denying her motion to dismiss and/or strike all references to the child not fathered by Husband from all the pleadings;[1] and

II. Whether the evidentiary hearing was so tainted by the inclusion of the custody issue concerning the child not fathered by Husband that, with regard to the three children born to both parties to the marriage, the proceeding was rendered fundamentally unfair and a violation of due process.[2]

[1] Because we find that the Adams Circuit Court erred in denying Wife's motion, we need not address whether it abused its discretion in awarding Husband custody of this child.

[2] Wife also argues that the Adams Circuit Court lost jurisdiction of the case pursuant to Indiana Trial Rule 53.1. Indiana Trial Rule 53.1 permits a cause to be withdrawn from the trial court and transferred to our supreme court for the appointment of a special judge where the trial court has failed to rule on a motion within thirty days. On September 18, 2006, Wife filed a motion to withdraw the case pursuant to Indiana Trial Rule 53.1, arguing that the trial court had failed to rule on her August 8, 2006 motion to dismiss. The clerk determined that the ruling had not been delayed. The proper remedy for challenging the denial of a "lazy judge" motion is to seek a writ of mandate from the Indiana Supreme Court to compel the clerk to give notice and disqualify the judge. *State ex rel. Ind. Suburban Sewers, Inc. v. Hanson*, 260 Ind. 477, 480-81, 296 N.E.2d 660, 662 (1973). Wife sought the appropriate remedy and filed a writ of mandamus in the Indiana Supreme Court. On October 16, 2006, our supreme court denied her writ, stating:

Facts and Procedural History

On June 15, 1991, Husband and Wife were married. Husband and Wife had three biological children during the marriage. A fourth child, S.N.H., was born while the parties were married, but Husband is not the biological father. On April 21, 2005, Husband filed a petition for dissolution of marriage in the Adams Circuit Court, in which he alleged that all four children were born to the marriage. In her counter-petition, Wife also alleged that all four children were born to the marriage. On September 13, 2005, the trial court entered a provisional order granting Husband temporary custody of all four children.

In February 2006, Wife, on behalf of S.N.H., filed a paternity action in the Wells Circuit Court, naming Brent A. Mechling as respondent. Husband was not served with notice of the paternity action, but Wife's attorney informed his attorney in writing that a paternity action was in progress. Husband did not move to intervene. On July 26, 2006, the Wells Circuit Court issued an order finding that Mechling was the biological father of S.N.H., and awarding sole legal and physical custody of S.N.H. to Wife.

> [Wife] says the trial court failed to rule in a timely manner on her motion to dismiss, which was filed on August 8, 2006. On August 14, 2006, the trial court heard that motion and held the trial. The trial court later made an entry explaining that it denied the motion to dismiss at the beginning of the trial. [Wife] offers no transcript contradicting the trial court's representation. Thus, [Wife] fails to show she is entitled to relief on her "lazy judge" theory.

Appellant's App. at 343 (citations to record omitted). In essence, Wife claims that our supreme court erred in denying her writ because the denial was based upon the trial court's erroneous recollection, and requests that this Court direct the clerk to follow Trial Rule 53.1 and forward the matter to the Indiana Supreme Court for further action. Appellant's Br. at 26. However, she has already sought the appropriate remedy, and she failed to carry her burden. She cites no authority, and we know of none, that grants us the power to overrule our supreme court's decision to deny her writ. We therefore respectfully decline.

On August 8, 2006, Wife filed a motion in the Adams Circuit Court to dismiss proceedings and/or strike S.N.H. from the pleadings in the dissolution action, stating that Husband was not S.N.H's biological father and that the Adams Circuit Court did not have jurisdiction over S.N.H. In addition, Wife attached the Wells Circuit Court order finding that S.N.H. was the biological child of Mechling and awarding Wife legal and physical custody of S.N.H. Appellant's App. at 106.

On August 14, 2006, a final hearing on the marriage dissolution was held, and the trial court took the matter under advisement. On August 17, 2006, Husband filed a motion to add indispensable party and to reopen evidence. The motion was granted, and on September 6, 2006, a hearing was held in which Mechling, the added party, appeared and provided testimony that he was waiving any claim to custody of S.N.H. and believed it was in S.N.H's best interest to be placed with Husband.

On October 18, 2006, the Adams Circuit Court issued a dissolution decree and award of child custody. The court found, *inter alia*, that "as to Husband's petition for custody of [S.N.H.], the Paternity Decree is of no binding force" because Wife failed to comply with Indiana Code Section 31-17-3-9,[3] pursuant to which she was required to declare under oath (1) whether she had participated in any other litigation concerning the custody of S.N.H., (2) whether any other custody proceeding concerning S.N.H was pending in a court of this state or any other state, and (3) whether she knew of any other person not a party to the proceeding who had physical custody of S.N.H. or claimed to

[3] Effective July 1, 2007, Indiana Code Sections 31-17-3-1 through -25 were repealed and recodified as Sections 31-21-1-1 through 31-21-7-3. Ind. P.L.138-2007 §§ 45, 93.

have custody or parenting time rights with respect to S.N.H. *Id*. at 330-31. The court also found that it was in the best interests of all four children to be placed in Husband's custody.

Wife now appeals.

Discussion and Decision

I. Motion to Dismiss and/or Strike S.N.H. From the Pleadings

Wife asserts that the Adams Circuit Court erred in denying her motion to dismiss and/or strike S.N.H. from the pleadings because it lacked authority to disregard the order of the Wells Circuit Court and lacked statutory authority over S.N.H. Inasmuch as the Adams Circuit Court decision involves pure questions of law, that is, it does not require reference to extrinsic evidence, the drawing of inferences therefrom, nor the weighing of credibility for its disposition, our review is do novo. *Bader v. Johnson*, 732 N.E.2d 1212, 1216 (Ind. 2000).

In addressing Wife's claim, we first observe that at the time the dissolution action was initially commenced, both Husband and Wife claimed that S.N.H. was a child of the marriage. This is significant because "[b]efore the dissolution court may make a child custody determination, it must first determine whether it has jurisdiction to do so, i.e., whether the child at issue is a 'child of the marriage.'" *Russell v. Russell*, 682 N.E.2d 513, 515 (Ind. 1997). Our supreme court has held that, to be a child of the marriage, a child must be either a biological or an adopted child of *both parents*. *Id*. at 517; *see also* Ind. Code § 31-9-2-13 (defining "child" for purposes of the dissolution statute).

Wife asserts that under circumstances where both the mother and the husband

know that a child being born to the mother is not a child of the husband, such a child is deemed to be a child born out of wedlock. However, our supreme court has observed that

> In many cases, the parties to the dissolution will stipulate or otherwise explicitly or implicitly agree that the child is a child of the marriage. In such cases, although the dissolution court does not identify the child's biological father, the determination is the legal equivalent of a paternity determination in the sense that the parties to the dissolution--the divorcing husband and wife--will be precluded from later challenging that determination, except in extraordinary circumstances. *See Fairrow v. Fairrow*, 559 N.E.2d 597, 600 (Ind. 1990) (husband entitled to relief from support judgment only in event that "the gene testing results which gave rise to the prima facie case for relief in this situation became available independently of court action."). However, a child or a putative father is not precluded by the dissolution court's finding from filing a separate action in juvenile court to establish paternity at a later time. *See J.W.L. by J.L.M v. A.J.P.*, 682 N.E.2d 519 (Ind. 1997) (child); *K.S. v. R.S.*, 669 N.E.2d 399 (Ind. 1996) (putative father); *In re S.R.I.*, 602 N.E.2d 1014 (Ind. 1992) (putative father).

Russell, 682 N.E.2d at 518. Thus, it is not true, as Wife contends, that the Adams Circuit Court never had personal jurisdiction over S.N.H. If Husband's paternity had not been challenged, the Adams Circuit Court would have properly exercised its authority to determine custody as to S.N.H. However, that is not what occurred.

Instead, Wife, on behalf of S.N.H., initiated a paternity action in the county in which she then resided. *See* Ind. Code § 31-14-3-2 ("Venue lies in the county in which the child, the mother, or the alleged father resides."). Indiana Code Section 31-30-1-1 provides that the juvenile court has exclusive original jurisdiction in proceedings concerning paternity of a child under Indiana Code 31-14. Additionally, even after the juvenile court issues a final disposition of the matters brought before it, the juvenile court retains jurisdiction to the extent the judgment demands, e.g., the court could modify

custody, child support, and visitation. *In re Adoption of A.N.S.*, 741 N.E.2d 780, 785 n.6 (Ind. Ct. App. 2001).

Here, the Wells Circuit Court issued an order establishing paternity and placing custody of S.N.H with Wife. Wife argues that the Wells Circuit Court order, which she filed with her motion to dismiss and/or strike S.N.H. from the pleadings, demonstrates that the Wells Circuit Court has continuing jurisdiction over custody matters concerning S.N.H. and further establishes S.N.H is not a child of the marriage, such that the Adams Circuit Court does not have authority to make custody determinations as to S.N.H. In response, Husband urges that the Adams Circuit Court "had authority for finding that a paternity decree, as to the custody of S.N.H., had no binding force or effect." Appellee's Br. at 19.[4] He argues that Wife's noncompliance with Indiana Code Section 31-17-3-9 permits the Adams Circuit Court to ignore the Wells Circuit Court order.

We find that *A.N.S.* is helpful to the resolution of this issue. There, A.N.S. was born out of wedlock and the biological mother put A.N.S. up for adoption. Thirty-eight days after receiving notice, the putative father filed a paternity action. The biological mother moved for summary judgment alleging that the putative father's failure to file his paternity action within thirty days of receiving notice as required by statute required dismissal of his paternity action. The paternity court denied her petition and ordered paternity testing. In the meantime, the biological mother married, and she and her new husband filed a petition to adopt A.N.S. in a different court, alleging that the pending

[4] We note that Husband fails to respond to Wife's argument that, because S.N.H. is not a child of the marriage, the Adams Circuit Court does not have authority to make custody determinations concerning S.N.H.

paternity action was not in compliance with the notice statute. The adoption court found that the putative father's consent was irrevocably implied due to his failure to file his paternity action within the required time. Ultimately, the paternity court found that the putative father was the biological father. The putative father filed a motion in the adoption court to reconsider the issue of his implied consent. The adoption court granted his motion to reconsider, and the biological mother and her husband appealed. Another panel of this Court concluded that "the paternity court's judgment, even if not technically correct pursuant to the notice statute, was a final appealable order that forecloses relitigation of [putative father's] paternity through a collateral attack in the adoption proceedings." *Id*. at 784. We explained, "The paternity court may have entered a judgment that did not comport with the notice statute under the circumstance; however, any error in the determination does not render the judgment a nullity. The paternity court judgment, even if in error, could not be ignored." *Id*. at 786-87.

While the case before us involves a paternity action and a dissolution action rather than a paternity action and an adoption proceeding, we find that the principle at work in *Adoption of A.N.S.* to be applicable here. Regardless of whether the paternity action in the Wells Circuit Court comported with notice requirements, a determination we do not make here, the Adams Circuit Court does not have the authority to ignore the judgment of the paternity court establishing that Husband is not the father of S.N.H. and granting custody of S.N.H. to Wife.[5] Accordingly, we conclude that the Adams Circuit Court

[5] Although Husband did not receive official notice of the paternity action in the Wells Circuit Court, he was aware of its existence and took no steps to intervene or contest the court's decision. He then attempted to collaterally attack that decision in an inappropriate venue.

erred in denying Wife's motion to dismiss and/or strike S.N.H. from the pleadings. We therefore vacate the portions of the dissolution decree pertaining to S.N.H.[6]

II. Fundamental Fairness of Evidentiary Hearing

Wife also contends that the determination as to custody of the three biological children was marred by the inclusion of the custody determination regarding S.N.H., resulting in a fundamentally unfair hearing and a violation of her due process rights. She claims that "erroneous, irrelevant, contradictory issues and inferences permeate the record." Appellant's Br. at 49. Our review of the record reveals that the trial court was able to separate the issues involved in the custody determination of S.N.H. from the custody determination of the three biological children. In fact, the trial court made separate findings regarding S.N.H.

Additionally, the record reveals that the trial court's considerations in determining custody of the three biological children is in compliance with Indiana Code Section 31-17-2-8, which provides,

> The court shall determine custody and enter a custody order in accordance with the best interests of the child. In determining the best

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[6] We note that pursuant to Indiana Code Sections 31-9-2-35.5 and 31-14-13-2.5, Husband may take the appropriate steps in the Wells Circuit Court to assert that he is S.N.H's de facto custodian and seek custody of S.N.H. A de facto custodian is a person who has been the primary caregiver for and financial support of a child who has resided with that person for a specified time period based on the age of the child. Ind. Code § 31-9-2-35.5. A child's de facto custodian must be made a party to custody proceedings following paternity determinations or in marital dissolution actions, in addition to the natural parents. *In re Guardianship of L.L.*, 745 N.E.2d 222, 229 (Ind. Ct. App. 2001), *trans. denied*. Where the court finds by clear and convincing evidence that a child has been cared for by a de facto custodian, the court will, *inter alia*, consider the wishes of the child's de facto custodian in determining custody. *See* Ind. Code § 31-14-13-2.5 (setting forth factors to be considered in determining custody in cases where child has been cared for by de facto custodian).

> interests of the child, there is no presumption favoring either parent. The court shall consider all relevant factors, including the following:
>
> (1) The age and sex of the child.
> (2) The wishes of the child's parent or parents.
> (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
> (4) The interaction and interrelationship of the child with:
> (A) the child's parent or parents;
> (B) the child's sibling; and
> (C) any other person who may significantly affect the child's best interests.
> (5) The child's adjustment to the child's:
> (A) home;
> (B) school; and
> (C) community.
> (6) The mental and physical health of all individuals involved.
> (7) Evidence of a pattern of domestic or family violence by either parent.
> (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

Indeed, paragraph 21 of the dissolution decree states,

> That neither party filed a request for specific findings of fact or conclusion of law, therefore, with respect to the issue of custody of the parties' other children, … none are required. However, taking into consideration all relevant factors including those enumerated in I.C. 31-17-2-8, it is clearly in the best interest of the children that they be placed in the custody of Husband. In particular, the Court has considered the detrimental and disruptive effect that moving them to Louisiana[7] would have on them, and that continuity and stability in their lives would be best served in Husband's custody. Custody with Husband will provide the children with continuing interaction with their maternal and paternal families and friends; and they will continue attendance at schools where they have always attended. It would unquestionably be in all of the children's best interest to be placed in the custody of Husband.

Appellant's App. at 333. In sum, the record does not support a conclusion that the evidentiary hearing was fundamentally unfair and violated Wife's due process rights. We

[7] Wife was planning on moving to Louisiana, and, if awarded custody of the children, would take the children with her to Louisiana.

therefore affirm the Adams Circuit Court's award of custody of the parties' three biological children to Husband.

Affirmed in part and vacated in part.

BAKER, C. J., and FRIEDLANDER, J., concur.